Repco Holdings Bhd v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVISION NO W-43-7 OF 1997
GOPAL SRI RAM JCA
2 OCTOBER 1997

Constitutional Law *— Constitution — Infringement of — Whether s 126(2) of the Securities Industry Act 1983 and s 39(2) of the Securities Commission Act 1993 were ultra vires art 145(3) of the Federal Constitution and were void to that extent*

Constitutional Law *— Legislature — Infringement of Constitution — Doctrine of prospective overruling — Power of the court to apply doctrine*

Criminal Procedure *— Prosecution — Right to conduct prosecution — Whether any other authority apart from the Public Prosecutor may be lawfully empowered to conduct prosecution — Federal Constitution art 145(3) — Securities Industry Act 1983 s 126(2) — Securities Commission Act 1993 s 39(2)*

Securities *— Conduct of prosecution under the Securities Industry Act 1983 — Whether any other authority apart from the Public Prosecutor may be lawfully empowered to conduct prosecution — Federal Constitution art 145(3) — Securities Industry Act 1983 s 126(2) — Securities Commission Act 1993 s 39(2)*

The applicant, Repco Holdings Bhd ('Repco'), was charged by the Securities Commission ('the commission') — a body created by the Securities Commission Act 1993 ('the SCA') — for infringing s 86 of the Securities Industry Act 1983 ('the SIA'). At the hearing, counsel for Repco took a preliminary objection to the locus standi of the two officers of the commission who appeared to prosecute the case. The prosecution was conducted by the two officers pursuant to the joint operation of s 126(2) of the SIA and s 39(2) of the SCA which, inter alia, allow prosecution of any offence under the Acts to be conducted by the Registrar of Companies or by any officer authorized by the Registrar or the Chairman of the commission or the commission. It was argued that s 126(2) of the SIA and s 39(2) of the SCA were ultra vires art 145(3) of the Federal Constitution and were void to that extent. The sessions judge, faced with the constitutional argument, acted under s 30 of the Courts of Judicature Act 1964 and transmitted the record in the case to the High Court to determine the constitutionality of the two subsections.

Held, declaring both s 129(2) of the SIA and s 39(2) of the SCA to be unconstitutional, null and void:

(1) The only authority that is constitutionally entitled to conduct prosecutions is the Attorney General as Public Prosecutor. The adjectival vehicle contained in s 376 and subsequent sections of the Criminal Procedure Code (FMS Cap 6) ('the CPC') put this beyond doubt (see p 688B); *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 and *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65 followed.

(2) Based on authorities, the expression 'conduct' appearing in art 145(3) and in the two impugned subsections carries the same meaning. Since the Constitution exclusively authorizes the Attorney General to conduct prosecutions, in must follow that no other authority may be lawfully empowered to exercise that function. Therefore, s 126(2) of the SIA which allows prosecution to be conducted by the Registrar of Companies or by any officer authorized by the Registrar or the Chairman of the commission is ultra vires art 145(3) of the Federal Constitution. However, if the Registar of Companies is a gazetted deputy public prosecutor and in such capacity conducts a prosecution of an offence under the SIA, that would not be caught by art 145(3) of the Constitution. On the other hand, the Chairman of the commission is not placed on an equal footing and therefore not authorized constitutionally to authorize or to conduct prosecutions under the SIA. Further, although for the purpose of carrying out their duties, members and servants of the commission are deemed to be public officers, they do not fall within the scope of s 380(i) of the CPC to allow them to conduct prosecution (see p 690C–G); *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 and *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66 followed.

(3) In the same way, s 39(2) of the SCA wholly contravenes art 145(3). By reason of art 4(1) of the Federal Constitution, it being a law which is inconsistent with the Constitution, the subsection gives way and is therefore void and unconstitutional (see p 691B).

(4) It would be a manifest injustice to render a retrospective ruling on the invalidity of the two impugned subsections. The declaration as to invalidity shall, therefore, be prospective only and shall include only the present case and cases registered from the date of the ruling (see p 692A–B); *PP v Dato Yap Peng* [1987] 2 MLJ 311 and *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 followed.

[Bahasa Malaysia summary

Pemohon, Repco Holdings Bhd ('Repco'), telah dipertuduhkan oleh Suruhanjaya Sekuriti ('suruhanjaya tersebut') — sebuah badan yang ditubuhkan oleh Akta Suruhanjaya Sekuriti 1993 ('ASS') — kerana melanggar s 86 Akta Perindustrian Sekuriti 1983 ('APS'). Di pembicaraan, peguam Repco membuat bantahan permulaan atas locus standi dua orang pegawai suruhanjaya tersebut yang hadir untuk mendakwa kes. Pihak pendakwa dikendalikan oleh dua orang pegawai tersebut menurut operasi bersama s 126(2) ASS dan s 39(2) APS yang, antara lain, membenarkan pendakwaan mana-mana kesalahan di bawah Akta-Akta tersebut untuk dijalankan oleh Pendaftar Syarikat atau oleh mana-mana pegawai yang diberikuasa oleh Pendaftar Syarikat atau Pengerusi suruhanjaya tersebut atau suruhanjaya tersebut. Adalah dihujahkan bahawa s 126(2) ASS dan

s 39(2) APS adalah ultra vires perkara 145(3) Perlembagaan Persekutuan dan adalah terbatal setakat itu. Hakim sesyen, yang dihadapi dengan hujah perlembagaan, bertindak di bawah s 30 Akta Mahkamah Kehakiman 1964 dan menghantar rekod kes ke Mahkamah Tinggi bagi menentukan perlembagaan dua subseksyen itu.

Diputuskan, mengisytiharkan kedua-dua s 129(2) APS dan s 39(2) ASS tidak menurut perlembagaan, tak sah dan terbatal:

(1) Satu-satunya autoriti yang berhak di sisi perlembagaan untuk mengendalikan pendakwaan adalah Peguam Negara sebagai Pendakwa Raya. Susunan prosedur yang termaktub dalam s 376 dan seksyen-seksyen yang berikutnya dalam Kanun Acara Jenayah (NMB Bab 6) ('KAJ') meletakkan perkara ini di luar batas keraguan (lihat ms 688B); *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116 dan *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65 diikut.

(2) Berdasarkan autoriti-autoriti, ungkapan 'menjalankan' yang menonjol dalam perkara 145(3) dan dalam dua subseksyen yang dipersoalkan membawa maksud yang sama. Oleh kerana Perlembagaan memberikuasa kepada Peguam Negara secara eksklusif untuk menjalankan pendakwaan, ini bermakna bahawa tiada pihak berkuasa yang lain boleh mempunyai kuasa di sisi undang-undang untuk melaksanakan fungsi itu. Maka, s 126(2) APS yang membenarkan pendakwaan dijalankan oleh Pendaftar Syarikat atau mana-mana pegawai lain yang diberikuasa oleh Pendaftar atau Pengerusi suruhanjaya tersebut adalah ultra vires perkara 145(3) Perlembagaan Persekutuan. Walau bagaimanapun, jika Pendaftar Syarikat adalah timbalan pendakwa raya yang diwartakan dan dalam keupayaan demikian menjalankan pendakwaan ke atas kesalahan di bawah APS, ini tidak terperangkap oleh perkara 145(3) Perlembagaan. Sebaliknya, Pengerusi suruhanjaya tersebut tidak berada dalam kedudukan yang sama dan dengan itu tidak diberikuasa menurut perlembagaan untuk memberikuasa atau untuk menjalankan pendakwaan di bawah APS. Selanjutnya, walaupun untuk tujuan menjalankan tugas, ahli-ahli dan pekerja-pekerja suruhanjaya tersebut dianggap sebagai pegawai awam, mereka tidak dirangkumi oleh skop s 380(i) KAJ bagi membenarkan mereka menjalankan pendakwaan (lihat ms 690C–G); *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 dan *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66 diikut.

(3) Dalam cara yang sama, s 39(2) ASS pada keseluruhannya menyalahi perkara 145(3). Disebabkan perkara 4(1) Perlembagaan Persekutuan, ia merupakan undang-undang yang tidak konsisten dengan Perlembagaan, subseksyen itu memberi laluan dan dengan itu adalah tak sah dan melanggar perlembagaan (lihat ms 691B).

(4) Adalah sungguh tidak adil untuk membuat keputusan secara kebelakangan atas ketaksahan dua subseksyen yang dipersoalkan.

Dengan itu, perisytiharan atas ketaksahan haruslah menjadi prospektif sahaja dan harus termasuk hanya kes ini dan kes-kes yang didaftarkan dari tarikh keputusan (lihat ms 692A–B); *PP v Dato Yap Peng* [1987] 2 MLJ 311 dan *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 diikut.] A

Notes B

For a case on infringement of Constitution, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 993.

For cases on securities, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 766–793.

For a case on the right to conduct prosecution, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2040. C

Cases referred to

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (refd) D

Johnson Tan Han Seng v PP [1977] 2 MLJ 66 (folld)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Long bin Samat & Ors v PP [1974] 2 MLJ 152 (folld)

Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119 (folld) E

PP v Datuk Harun bin Hj Idris & Ors [1976] 2 MLJ 116 (folld)

PP v Lim Shui Wang & Ors [1979] 1 MLJ 65 (folld)

PP v Dato Yap Peng [1987] 2 MLJ 311 (folld)

Raymond v Attorney General [1982] 2 WLR 849 (refd)

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan Malaysia & Anor [1996] 1 MLJ 261 (refd) F

Legislation referred to

Courts of Judicature Act 1964 s 30

Criminal Procedure Code (FMS Cap 6) ss 376, 380, 380(i) G

Federal Constitution arts 4(1), 145(3)

Securities Commission Act 1993 s 39(2)

Securities Industry Act 1983 ss 86, 91, 126(2)

Muhammad Shafee Abdullah (*Ng Aik Guan* with him) for the applicant.

Azhar Mohamed and *Shamsul Sulaiman* (Deputy Public Prosecutors) for the respondent. H

Gopal Sri Ram JCA (delivering oral judgment): This is an application under s 30(1) of the Courts of Judicature Act 1964. That section reads as follows:

30 (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court. I

(2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 48 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

(3) Subsections (1) and (2) shall be deemed to be rules of court for the purposes of Article 128(2) of the Constitution.

The matter arose in the following way.

The applicant, Repco Holdings Bhd ('Repco') is a public limited company. Its shares are freely traded in the Kuala Lumpur Stock Exchange. On 27 January 1996, Repco issued a statement to the Kuala Lumpur Stock Exchange. The statement contained certain facts which the Securities Commission considered to contravene s 86 of the Securities Industry Act 1983 ('the SIA'). So it took steps to institute proceedings against Repco. On 21 October 1996, it applied for and obtained a summons from the Sessions Court in Kuala Lumpur against Repco. The charge annexed to the summons refers to the Repco's statement I spoke of a moment ago and alleges an infringement of s 86 of the SIA and punishable under s 91 thereof.

The summons was returnable on 29 November 1996. Repco appeared before the sessions court on that day. The sessions court then fixed the case for hearing on 25 August 1997. On that date, counsel who appeared for Repco took a preliminary objection to the locus standi of the two officers who appeared to prosecute the case. These two officers were Ms Foo Lee Mei and Ms Seow Siew Mei. They were officers of the Securities Commission, a body created by the Securities Commission Act 1993 ('the SCA'). The prosecution of the case against Repco was in the hands of these two officers pursuant to the joint operation of s 126(2) of the SIA and s 39(2) of the SCA. For completeness, I will reproduce both these sections in full. They read as follows.

Section 126(2) of the SIA:

126 (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) A prosecution for any offence against any provision of this Act may be conducted by the Registrar or by any officer authorized in writing by the Registrar or by any officer authorized in writing by the Chairman of the Commission.

Section 39(2) of the SCA:

39 (1) No prosecution for any offence under this Act shall be instituted except with the consent in writing of the Public Prosecutor.

(2) Any officer of the Commission authorized in writing by the Commission may conduct any prosecution of any offence under this Act.

So far as sub-s (1) of each of the foregoing are concerned, they make it clear that the institution of a prosecution under each enactment shall be only with the consent of the Public Prosecutor. The importance of this will appear later in this judgment. However, as may be noted, sub-s (2) of each of the aforesaid sections vests the conduct of prosecutions under each enactment in the hands of persons other than the Public Prosecutor.

Accordingly, before the sessions court, counsel for Repco took the point that the two ladies I mentioned earlier had no locus standi to conduct the prosecution in this particular case. It was argued that s 126(2) of the SIA and s 39(2) of the SCA were ultra vires art 145(3) of the Federal Constitution and were void to that extent. The sessions judge, faced with the Constitutional argument, acted under s 30 of the Courts of Judicature Act 1964 and transmitted the record in the case to this court to determine the constitutionality of the two subsections I mentioned a moment ago. That is how I, sitting as a High Court judge, have come to hear this application.

So much for the factual background.

In order to appreciate the arguments advanced in favour of the applicant before the sessions court, and repeated in substance before me this morning by its counsel En Muhammad Shafee, it is necessary to hearken to the relevant provisions of the written law that govern the subject matter at hand. These are, art 145(3) of the Federal Constitution, s 376 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') and s 380 of the same Code. They are as follows.

First, art 145(3) of the Federal Constitution:

> 145 (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

Next, s 376 of the CPC:

> 376 (i) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.
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> (ii) The Solicitor General shall have all powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in case of the absence or inability to act of the Attorney General.
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> (iii) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally.
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> (iv) The rights and powers vested in or exercisable by the Public Prosecutor by subsection (iii) and section 68(ii) shall be exercisable by the Public Prosecutor personally.

Third, s 380 of the CPC:

380 Notwithstanding anything in this Chapter contained —

(i) any public officer may prosecute in any Court in any case or class of cases in which he is by any written law authorized to prosecute in such Court;

(ii) in summary non-seizable cases in the Court of a Magistrate —

(a) the Public Prosecutor or a Deputy Public Prosecutor or a Police Officer may appear and conduct any prosecution;

(b) any officer of any Government department or of any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce;

(c) any private person may appear in person or by advocate or, in the State of Terengganu, by a pleader and prosecute for an offence against his own person or property.

It will be seem at once, from a reading of the plain language of art 145(3), that the Supreme Law, namely the Federal Constitution, has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings. The phrase 'institute, conduct or discontinue' was considered by Abdoolcader J (as he then was) in *PP v Datuk Harun bin Hj Idris & Ors* [1976] 2 MLJ 116. Of the expression 'conduct', his Lordship said (at p 119E–I):

> 'Conduct' in art 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in s 377 of the CPC. And 'control and direction' in s 376(i) of the CPC is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.
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> 'Conduct' of criminal prosecutions and proceedings in art 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under item 4 and in particular para (b) there in List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of art 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law — namely, the Subordinate Courts Act 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.
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> Pursuing its signification, 'to conduct' means 'to lead, guide, manage' (*Re Bhupalli Malliah* AIR 1959 AP 477; *Pride of Derby v British Celanese Ltd* [1953] 1 Ch 149 at p 167, per Lord Evershed MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence.

Abdoolcader J's interpretation of the phrase 'institute, conduct or discontinue' was approved and applied by the Federal Court in *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65.

It follows from the foregoing discussion that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney General as Public Prosecutor. The adjectival vehicle contained in s 376 and subsequent sections of the CPC put this beyond doubt. The question then arises: Is Parliament entitled by written law to vest the power to conduct criminal prosecutions in an authority other than the Attorney General?

Encik Muhammad Shafee has argued that this question should receive a negative response. The Public Prosecutor upon whom lies a most onerous burden has considered the arguments and has come to the honest and inescapable conclusion that En Muhammad Shafee is correct in the contentions that he has advanced. Commendably therefore, the Public Prosecutor has instructed his deputy who has appeared before me today to concede that the two subsections referred to do indeed conflict with art 145(3) of the Federal Constitution. However, this being an issue of public law, the agreement between counsel before me does not absolve this court of the duty to investigate the question of its own volition and decide whether the common ground upon which the parties before me stand is indeed maintainable in law. If I come to the conclusion that the impugned subsections are not ultra vires art 145(3), I am at liberty to so declare despite the agreement arrived at between counsel. However, having given the matter my most anxious consideration, I have come to the conclusion that the Public Prosecutor is correct in the concession he has made.

Acting with utmost fairness, En Azhar bin Mohamed, deputy public prosecutor, has cited to me cases which he says are useful in making my determination upon the issue at hand. I think I owe it to efforts of counsel to enter upon a discussion of the case which he has cited.

The first is *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 where at p 158A–C, Suffian LP had this to say:

> In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pp 32–33 in *Smedleys Ltd v Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
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> Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

A The second authority which the learned deputy has drawn to my attention is *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66 where, at p 70A–F, Suffian LP once again said of art 145(3):

> ... Before Merdeka Chap XXXVII of the FMS Criminal Procedure Code and the equivalent provisions of the SS Criminal Procedure Code set out
B his power. Today, only the FMS Code remains. Section 376(i) thereof provides generally that the Attorney General in his capacity as Public Prosecutor shall have the control and direction of all criminal prosecutions and proceedings under the Code. The next nine sections particularize his powers.
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> For instance, under s 381, he may enter a *nolle prosequi* after he has received the record of a preliminary enquiry. As noted by this court in *Long*
C *bin Samat v PP* [1974] 2 MLJ 152, there was ample judicial authority before Merdeka to show that the Attorney General enjoyed wide discretion in regard to criminal prosecutions. As s 376(i) of the Criminal Procedure Code was already in existence before Merdeka, our constitution-makers could have been content with relying on it alone to preserve after Merdeka the Attorney General's pre-Merdeka power, and if they had done so, then
D it might be arguable that after Merdeka, it must be read subject to art 8: but our constitution-makers were not content to do so. They deliberately wrote art 145(3) into our Constitution which reads:
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> > 'The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a native court or a court-martial.'
>
E The language of this provision is very wide, for it includes the word 'discretion' which means liberty of deciding as one thinks fit. In view of the deliberate decision of our constitution-makers to write this provision into our Constitution, I do not think that it can be said that it must be read subject to art 8.

F The importance of the propositions formulated by the learned Lord President in these two cases is that, as a matter of public law, the exercise of discretion by the Attorney General in the context of art 145(3) is put beyond judicial review. In other words, the exercise by the Attorney General of his discretion, in one way or another, under art 145(3), cannot
G be questioned in the courts by way of certiorari, declaration or other judicial review proceedings.

I think that the proposition is not only good law but good policy. For, were it otherwise, upon each occasion that the Attorney General decides not to institute or conduct or discontinue a particular criminal proceedings, he will be called upon to a court of law the reasons for his decision. It will
H then be the court and not the Attorney General who will be exercising the power under art 145(3). That was surely not the intent on our founding fathers who framed our Constitution for us.

Encik Muhammad Shafee has drawn my attention to a passage in a leading work upon the subject. It is a textbook entitled *The Attorney*
I *General: Politics and the Public Interest* by Prof Edwards whose other work, *Law Officers of the Crown*, has been often quoted with approval by our courts. At p 91 of the text, Prof Edwards expresses the following view. The word 'conduct', it was stated:

> ... appears to be wider that the phrase 'carry on' and suggests to our minds that when the Director intervenes in a prosecution which has been privately instituted, he may do so not exclusively for the purpose of pursuing it by carrying it on, but also with the object of aborting it; that is to say, he may 'conduct' the proceedings in whatever manner may appear expedient in the public interest.

The author was there quoting from the judgment of the English Court of Appeal in *Raymond v Attorney General* [1982] 2 WLR 849 at p 853.

In my judgment, having regard to the authorities read before me, the expression 'conduct' appearing in art 145(3) and in the two impugned subsections carries the same meaning. Since the Constitution exclusively authorizes the Attorney General to conduct prosecutions, in must follow, as night follows day, that no other authority may be lawfully empowered to exercise that function. Therefore, it is my opinion, that s 126(2) of the SIA is ultra vires art 145(3) of the Federal Constitution save to the extent I shall now indicate.

Subsection (2) of s 126 of the SIA refers to the conducting of a prosecution by the Registar of Companies or by someone authorized by such Registrar in writing. As a matter of practice, the Registar of Companies is usually a senior member of the Judicial and Legal Service. He or she is normally gazetted as a deputy public prosecutor. So, if the Registar of Companies is a gazetted deputy public prosecutor and in such capacity conducts a prosecution of an offence under the SIA, that would not be caught by art 145(3) of the Constitution. But the Chairman of the Securities Commission is not placed on an equal footing. He is therefore not authorized lawfully, that is to say constitutionally, to authorize or to conduct prosecutions under the SIA.

Neither does s 380(i) of the CPC, relied on by the prosecutors before the sessions court, provide any assistance to the Securities Commission. As pointed out by the learned deputy public prosecutor, the expression 'public officer' appearing in that section refers to members of the public service. While for the purpose of carrying out their duties, members and servants of the Securities Commission are deemed to be public officers, they do not fall within the scope of s 380(i) of the CPC.

Encik Muhammad Shafee has very properly drawn my attention to s 126(2) as it originally appeared before the amendment. I think it useful to reproduce the section as it originally stood:

> 126 (2) Without prejudice to the provision of section 379 of the Criminal Procedure Code, an advocate and solicitor may, with the previous permission in writing of the Public Prosecutor, be employed by the Government to conduct any criminal prosecution, or to appear in any criminal appeal, on behalf of the Government; such advocate and solicitor shall be paid by the Government such remuneration as may be agreed between the Government and the advocate and solicitor, and while so employed he shall be deemed to be a 'public servant' within the meaning of the Penal Code.

A Section 126(2) as originally cast did not, in my judgment, contravene art 145(3), because of the careful way in which it was drafted. On the other hand, s 126(2) as presently worded cannot be read harmoniously with art 145(3) to the extent I have earlier indicated.

Turning now to s 39(2) of the SCA, it is my judgment that this B subsection wholly contravenes art 145(3). By reason of art 4(1) of the Federal Constitution, it being a law which is inconsistent with the Constitution, the subsection gives way. I would declare it void and unconstitutional.

In arriving at my decision, I have not overlooked the important C principles that govern the interpretation of written constitutions. Our Federal Constitution is a living document written for all time. Its language compresses within it ideas that are manifold and concepts that are multifaceted. The task of the judicial interpreter of such a document is not to place it in a coffin and nail the lid but to breathe life into it and to give effect to the full breadth and width of its great language. That is the spirit D in which our courts have approached our Constitution on previous occasions. In this context, I need only mention the decisions of our Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119; *Tan Tek Seng v Suruhanjaya Perkhidmatan* E *Pendidikan Malaysia & Anor* [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481.

There is, no doubt a presumption; even a strong presumption; that an Act of Parliament is constitutional. It would require much conviction to strike down a solemn act of legislation by a democratically elected F Parliament. Nevertheless, once it has been amply demonstrated, as has been done in the present case, that an Act of Parliament contains provisions that are in direct conflict with the supreme law, it is the duty of this court to say so clearly and unequivocally.

For the reasons I have given thus far, I would declare s 126(2) of the G SIA to be unconstitutional, null and void and of no effect, save to the extent earlier indicated. In the same way I would declare s 39(2) of the SCA to be unconstitutional, null and void and of no effect.

At the conclusion of arguments, the learned deputy drew my attention to the fact that there has been already some prosecutions pursuant to s 126(2) of the SIA and s 39(2) of the SCA. There are also part heard H cases presently pending before the subordinate courts, some of which may be well advanced or nearing conclusion.

Now, as a general rule, the declaration of invalidity of a written law on the grounds that it runs foul of the Federal Constitution has retrospective effect. But, the court is fully authorized, having regard to public interest, I to make a prospective declaration so as not to render invalid convictions entered and proceedings already concluded before the challenge is taken on the ground on unconstitutionality.

In my judgment, it will be a manifest injustice to render a retrospective ruling on the invalidity of the two impugned subsections. The declaration as to invalidity I now make shall, therefore, be prospective only and shall include only this case and cases registered from today. In doing so, I act on the authority of the Supreme Court's decision in *PP v Dato Yap Peng* [1987] 2 MLJ 311 and *Mamat bin Daud v Government of Malaysia.* Accordingly, the ruling that I have just pronounced shall take effect from 2 October 1997.

Order accordingly.

Reported by Loo Lai Mee